Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

EDWARD J. SPELLACY, JR., et al.,

Petitioners,

v.

AIRLINE PILOTS ASSOCIATION-INTERNATIONAL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Seventh Amendment and Rule 50 of the Federal Rules of Civil Procedure permit a court, when ruling on a motion for judgment as a matter of law, to weigh the evidence of the parties or do they instead restrict the court to considering only the evidence that is favorable to the nonmovant and any unfavorable evidence that the jury was required to believe?

2. Did both the district court and the court of appeals violate Rule 20(a) of the Federal Rules of Civil Procedure by treating each of the 82 petitioners as a single group, rather than as distinct individuals whose claims each had to be evaluated on their own particular merits?

LIST OF PARTIES AND AFFILIATES

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There are no corporate petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 156 F.3d 120. It is reprinted in the appendix to this petition ("Pet. App.") at A1-22.

JURISDICTION

The court of appeals entered judgment on August 12, 1998. Petitioners thereupon filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which the court denied on October 13, 1998. This Court has jurisdiction to review the court of appeals' judgment under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of Rules 20(a) and 50 of the Federal Rule of Civil Procedure. The rules are reproduced in the attached appendix.

STATEMENT

At bottom, this case is about union officials who placed their own self-interest in job and career preservation above the airline pilots whom, under federal labor law, they were obligated to represent fairly, honestly and in good faith. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 71 (1991). It is also about 11 jurors who, through their verdicts and in the exercise of their constitutional duties, held those union officials accountable for their misdeeds.

I. Petitioners submit the following detailed factual statement to show how the court of appeals' use of an incorrect legal standard for reviewing a grant of judgment as a matter of law under Rule 50 directly affected the court's decision to overturn the jury's unanimous verdicts in favor of petitioners.[1]

A. Petitioners are 82 Pan American World Airways ("Pan Am") pilots who lost their jobs, and in many cases their careers, when Pan Am closed its doors on December 4, 1991. As a group, petitioners were among the most senior pilots at Pan Am. While employed at Pan Am, the pilots were represented by respondent Airline Pilots Association ("ALPA"), a labor organization that was the

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[1] Where possible, this factual summary is supported by citations to the court of appeals' opinion. Facts not referenced in the opinion, but which are based upon trial testimony and documentary evidence, are supported by citations to the volume and page number of the Joint Appendix (*e.g.*, "II JA 37") filed in the court of appeals.

duly authorized and exclusive collective bargaining representative for Pan Am pilots. Pet. App. A2. ALPA's coordinating council for pilots at Pan Am was the Pan Am Master Executive Council ("MEC"). *Id.* The individual respondents were officers and elected representatives of the MEC. *Id.* at A2-3.

The rights and obligations of petitioners and their fellow Pan Am pilots were set forth in great detail in the Pilots Working Agreement ("PWA"), the collective bargaining agreement between Pan Am and its pilots. *Id.* at A4. The PWA covered all aspects of the working lives of pilots at Pan Am. Most important, the PWA explicitly provided that pilots' entitlements and obligations would be determined and allocated according to a pilot's date of hire, *i.e.*, his seniority.[2] As respondent Richard Burke conceded at trial, "Everything that we do as a pilot is predicated on our seniority number at our company." III JA 80 at A251.

Consistent with this overarching principle, the PWA established a seniority-based methodology by which, among other things, all aircraft assignments were determined. Pet. App. A4. Thus, whenever Pan Am projected a major change or "shift" in its flight operations, such as when routes and flight schedules were changed, or when

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[2] Specifically, section 3-A of the PWA provided in pertinent part: "Seniority shall govern all pilots in case of promotion or demotion, their retention in case of reduction in force, their assignment or reassignment due to expansion or reduction in force, their choice of vacancies, placement or replacements. . . . *[This section] shall apply except where specifically excepted in the [PWA].*" Pet. App. A12 (emphasis added).

aircraft and routes were sold or purchased, Pan Am announced the change to the pilots and issued a "proffer." *Id.* The flight positions created as a result of the shift in flying were posted in the proffer and pilots had the opportunity to "bid" for those positions and opportunities. *Id.* at A5. Pan Am then issued "awards" to the pilots, deciding among the bidders based on their relative system seniority and trained them as necessary. *Id.*

Beginning in the late 1960's, Pan Am began to experience financial difficulties. *Id.* at A3. To survive, Pan Am began to sell off assets and routes, but these sales only exacerbated Pan Am's difficulties and in January 1991, Pan Am filed for reorganization under the bankruptcy laws. *Id.* At no time, however, did Pan Am seek to reject the PWA, as it could have under § 1113 of the Bankruptcy Code. I JA 417.

While in reorganization, Pan Am continued to search for potential buyers of its remaining assets. Pet. App. A3. In early July 1991, the MEC informed Pan Am's pilots that Delta Airlines ("Delta") had agreed, as part of an Asset Purchase Agreement ("APA"), to purchase Pan Am's North Atlantic routes and its Northeast corridor "shuttle" operation. *Id.* Under the APA, Pan Am agreed to sell Delta its entire fleet of 21 Airbus 310 ("A-310") aircraft, and up to 19 Boeing 727 ("B-727") aircraft. *Id.* Delta also agreed that it would fund a restructured, albeit smaller, Pan Am that would operate out of Miami and serve Latin America. *Id.*

From the pilots' perspective, the key element of the APA was its requirement that Pan Am supply Delta with

nearly 800 Pan Am pilots who were "current and qualified" on those two aircraft.[3] *Id.* at A4. Although the exact numbers changed somewhat over time, Delta needed approximately 494 current and qualified pilots to fly the A-310 aircraft, and about 280 to fly the B-727. *Id.* Delta required the transfer of aircraft and pilots to take place no later than November 1, 1991. *Id.* As of July 31, however, Pan Am did not have enough current and qualified A-310 pilots on hand to meet the Delta quota for that aircraft. Therefore, Pan Am *had* to train additional pilots to meet the Delta quota. *Id.*

Pan Am desperately needed the hundreds of millions of dollars that Delta had agreed to pay under the APA. I JA 275. In fact, Pan Am wanted that money so badly that it authorized the expenditure of whatever sum of money was necessary to train pilots to meet the Delta quota by the November 1 deadline (which would have been trivial in relation to the amount it would have received from Delta). I JA 367. As Vito Cutrone, Pan Am's director of crew planning and scheduling, testified, the Chairman of Pan Am directed him to make sure the deal got done and "[h]e put no economic holds or limitations on me in doing it." *Id.* Pan Am understood, however, that it could not unilaterally impose a methodology for selecting pilots for training on the A-310 without the MEC's approval

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[3] A "current and qualified" pilot was one who was qualified, by training, to fly a particular aircraft, and had made 3 takeoffs and landings within the past 90 days on that aircraft. Pet. App. A4.

and cooperation. I JA 274, 334-35, 414. Cutrone acknowledged, therefore, that Pan Am would have done whatever the MEC wanted, as long as it "worked." I JA 340.

B. With Pan Am in bankruptcy and selling off assets in a desperate bid for survival, respondent Hauck described the prospects of remaining at Pan Am as "frightening." I JA 487. As the sole ALPA representative to the Pan Am creditors committee, respondent Burke, the chairman of the MEC, was privy to material non-public information about Pan Am's worsening financial condition and its unlikely prospects for surviving bankruptcy (I JA 305), information that he shared with his co-respondents on the MEC, but not with the pilots. I JA 286, 313. Based on this inside information, the other members of the MEC shared Hauck's and Burke's view that Pan Am's chances of survival were dismal, and that those pilots who were not able to transfer to Delta would almost certainly lose their careers in a few months. I JA 294, II JA 27 at A4179. At no time during the relevant events, however, did the MEC share any of this critical information with petitioners and their fellow pilots.

On July 20, Cutrone made a presentation to Delta at which he stated that Pan Am could complete 120 "long-course" A-310 training classes (i.e., training for pilots who had no previous experience on the aircraft, which included many petitioners) by November 1. Pet. App. A4. This would have provided Pan Am with a sufficient number of "current and qualified" pilots to meet Delta's requirements. On July 24, Cutrone made a similar presentation to union officials and again stated that Pan Am could complete 120 long-course training classes by

November 1. I JA 333, 488. To that end, documentary evidence presented at trial established that on August 1, Pan Am authorized the expenditure of over $800,000 to purchase enough A-310 flight simulator time for 120 long-course training positions. I JA 329, 339, III JA 69. Pan Am also arranged to use its own simulators in Miami, and Canada Air's simulators in Toronto. *Id.*

As petitioners showed at trial, Cutrone's repeated representations that Pan Am could train only 120 long-course positions on the A-310 created an unavoidable conflict of interest for the individual respondents – a conflict between preserving their own careers or representing the interests of petitioners and their fellow pilots fairly and honestly by ensuring that the selection of pilots for training, and therefore transfer to Delta, respected the seniority principle at the heart of the PWA. For example, two union officials, respondents Littlefield and Lankford, were not current and qualified on the A-310 and were, respectively, numbers 1449 and 1565 on the seniority list of over 2000 pilots.[4] I JA 479-80. Respondent Burke's chances of being among the pilots trained on the A-310 were also minimal since he also had a low seniority number (number 938), and because he was not current on the B-727, he should have had *no* chance of transferring on that aircraft either, regardless of his seniority. I JA 305, 413, 479.

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[4] Similarly, respondent Kelley, an A-300 first office, was number 1274 on the list. Respondent Bible, a B-727 captain, was 746 on the list. Respondent Hauck was an A-300 captain and number 598 on the seniority list. None of these respondents were likely to be among the 120 pilots trained on the A-310 *if* seniority were followed.

The initial response of the MEC to the situation its members found themselves in was to seek a delay in the closing date of the APA to allow more time for training pilots, thus increasing the number of pilots who could be trained, but on July 31, Delta rejected the MEC's delay proposal. Pet. App. A5. Having failed to convince Delta to push back the November 1 deadline, and with only 120 training positions on the A-310 available, respondents' conflict of interest hardened into actual self-dealing, deceptive and discriminatory conduct, and arbitrary decision-making.

On August 2, the union convened a critical 4-day meeting in Coral Gables, Florida to discuss, among other things, the methodology for selecting pilots for training. Pet. App. A5. Before that meeting, however, respondent Hauck set out to devise a training methodology that would ensure that he and several other members of the MEC would transfer to Delta on the A-310. I JA 281, II JA 60. Rather than offer pilots, in strict seniority order, the 120 long-course training slots that Cutrone said were available, Hauck designed a plan that called for Pan Am to provide only short-course, "requalification" training to pilots who had previously been qualified on the A-310, but were no longer current on that aircraft. Pet. App. A6. Not coincidentally, Hauck had previously flown the A-310, and was thus eligible for requalification training. *Id.* The same was true of other union officials. *Id.* In short, as the pilots showed at trial, the MEC decided to abandon seniority in favor of a training methodology that benefited its own members over other, more senior pilots.

On August 2, the MEC worked to reach agreement regarding the methodology that would be used to select

pilots for training and possible transfer to Delta. Hauck wrote in his August 2 notes that "[w]e need to develop the MEC [training] plan TODAY. *We need to decide who's going to [Delta].*" II JA 64 (capitalization in original; emphasis added.) The evidence showed that on August 4, the MEC reached agreement on use of a requalification methodology for the A-310 rather than offering long-course training. I JA 310-11, II JA 63 at A3900. However, in an effort to disguise its role in that determination, respondents deleted all references to its decision on training methodology from the minutes of the Coral Gables meeting that were distributed to the pilots. I JA 263, 273, 317, 465-66, 472-73, II JA 62 at A46.

On August 5, respondents submitted their plan to Pan Am's vice-president of operations and, as expected, Pan Am acceded to the MEC's requalification plan. I JA 285, II JA 70 at A005425. At trial, respondents conceded that this "agreement" on the method for choosing pilots for training constituted a modification of the PWA. I JA 302-03, 416, 494. However, contrary to the express requirements of ALPA's constitution and bylaws, as well as its usual practices, the union never reduced this critical agreement to writing, and never had it signed by ALPA's president. I JA 272, 491.

C. Respondents then engaged in a series of deceptive acts and made a number of misrepresentations designed to hide, and delay discovery of, their involvement in the abandonment of seniority as the touchstone for training and transfer to Delta. On August 6, for example, the MEC issued a message to all pilots falsely stating

that it had been meeting to determine a training methodology but was "unable to decide between the final two methodologies," (II JA 14) and that the issue would therefore be submitted to an arbitrator on August 8 or 9. Pet. App. A6. Another message issued on August 7 stated that the arbitration would be held on August 9 and that the subject would be *"[t]he methodology for the training and transfer of Pan American pilots to Delta,"* even though, of course, the MEC had already decided that issue at Coral Gables. II JA 30 (emphasis in original).

On August 9, the MEC presented its purported dispute to an arbitrator, Sam Kagel. In marked contrast to their position at trial regarding the inapplicability of the PWA to the Delta transaction, each of the respondents agreed at that arbitration that the methodology for training pilots for possible transfer to Delta *had* to be based on seniority according to the PWA. III JA 80. Despite their statements to pilots that Kagel would decide which training methodology would be used on both the B-727 as well as the A-310, respondents never submitted the A-310 training issue to Kagel. I JA 280, 287-88, 299, 312, 320, 483-85, 496. Therefore, the only issue decided by Kagel was whether the PWA required training on the B-727 to be offered to award holders from a proffer the previous February or whether, under the circumstances of the Delta transaction, a new proffer was required. Pet. App. A6.

However, Kagel's decision on the B-727, issued on August 9, underscored the central importance of seniority under the PWA, and the duplicity of the MEC's selection of a requalification methodology for the A-310. Kagel decided that the seniority principles at the heart of the

PWA were so important that they required a new proffer, in strict seniority, for B-727 training. Pet. App. A6. Inarguably, he would have reached the same conclusion for the A-310 had respondents not withdrew the issue from him.

Continuing their efforts to delay discovery of their responsibility for selecting the requalification methodology (Pet. App. A17), the MEC issued a message to pilots on August 10 that falsely stated that Kagel had *actually decided* the methodology for training, not only on the B-727, but also on the A-310:

> To the extent possible, in recognition of the training constraints, pilots be proffered training on either the A-310 or B-727 in system seniority order, and the identified airmen who are current and qualified on either the A-310 or the B-727 aircraft, at the time of transfer of assets to Delta Air Lines, be afforded that privilege in system seniority order regardless of class and craft at Pan American.

II JA 20. As respondents admitted at trial, its messages to pilots regarding the Kagel arbitration were "inaccurate." The jury was certainly entitled to conclude that they were deliberately so.

At an August 15 union meeting in New York, over which respondents Hauck and Burke presided, respondents continued their campaign of deception to distance themselves from responsibility for the adoption of the requalification methodology on the A-310, to obscure their conflict of interest, and to confuse the pilots about the true state of affairs. Once again, Hauck misrepresented to the pilots that Kagel, rather than the MEC itself,

had decided that training on the A-310 would be done on a requalification basis only. Pet. App. A17. Hauck also lied about which of the respondents on the MEC were likely to transfer to Delta under the requalification methodology. He specifically said that only respondents Anderson, Hauck and Littlefield were "in the zone" for transfer to Delta. I JA 327, II JA 66 at 19. According to Hauck, respondents Bible, Kelley, and Burke were not "in the zone," while Lankford was described as "furloughed." *Id.* In fact, however, *every* member of the MEC except Kelley transferred to Delta, and Kelley went to United. Pet. App. A7. The very last person to receive training on the A-310 was Lankford, whose seniority was 1565 out of approximately 2000 pilots and who was thus the most junior member of the MEC. I JA 368-69. The jury was entitled to conclude that this was no mere coincidence, but rather the fulfillment of the union officials' scheme to transfer to Delta by adopting a requalification training methodology in lieu of following seniority, as the PWA required.

D. Despite the MEC's attempts to conceal its self-dealing, it eventually became apparent that pilots were not being offered the opportunity for training based upon seniority. Unaware of the MEC's complicity with Pan Am in the abandonment of their seniority rights, several petitioners asked respondents for assistance in filing a grievance against Pan Am to protest the abandonment of their seniority rights under the PWA. Yet the MEC refused to provide any assistance to petitioners, and not surprisingly, Pan Am denied the grievances at the first step. Pet. App. A11, A16.

In addition, on August 28, respondent Burke executed a secret agreement with Delta and the Delta MEC that effectively waived the rights of all Pan Am pilots to challenge the manner of their selection for transfer to Delta and their integration into the Delta pilots' seniority lists.[5] I JA 314, 315-16, II JA 38. Burke entered into this secret agreement, however, without any resolution authorizing him to waive the pilots' rights and without ever informing the pilots of this critical agreement affecting their rights. I JA 416. Not surprisingly, therefore, on November 1, Burke transferred to Delta as a B-727 co-pilot. Although the APA expressly required *all* transferring pilots to be current and qualified on the A-310 or B-727, it was undisputed that Burke lacked those qualifications. *Indeed, of the nearly 800 Pan Am pilots who transferred to Delta, respondent Burke – the Chairman of the MEC – was the only non-management pilot who was not current and qualified at the time of his transfer to Delta.* I JA 266, 305, 318-19.

II. On December 4, 1996, after the members of the MEC had transferred to Delta, their new employer decided that it would not fund a restructured Pan Am. I JA 178. Pan Am immediately ceased operations. Unlike

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[5] The secret agreement provided in pertinent part: "The Parties [Pan Am MEC, Delta MEC and Delta management] agree to accept the method of selection of Pan Am pilots that Delta has implemented in connection with the acquisition. . . . The Parties will support and defend this Agreement from any challenge *and will make no effort, either direct or indirect, to overturn or challenge it in any court proceeding or other forum.*" I JA 38 (emphasis added).

Burke and the other respondents, petitioners lost their jobs, and in some instances, their careers. The pilots then sued their former union, alleging that the members of the MEC had abandoned seniority in the training and transfer of pilots for Delta for their own selfish purposes, in violation of their federal labor law duty of fair representation as elected union officials. Pet. App. A7. In defense, the union argued that the seniority provisions of the PWA did not apply to the transfer of pilots to Delta and that "constraints" created by a purported lack of money and training simulator capacity made it impossible to train pilots based on system seniority. The pilots submitted testimony and documentary evidence to show that there were no constraints that would have prevented the union from adhering to seniority provisions of the PWA, which did, in fact, govern the training of pilots for transfer to Delta, as the union members themselves had acknowledged during the Kagel arbitration.

Thus, over the course of a three-week trial, the parties presented two extremely divergent factual cases to the jury, each dependent upon the credibility of a number of witnesses. The district court (Weinstein, J.) expressly asked the jury to determine whether ALPA had breached its duty of fair representation by acting in "bad faith," "arbitrarily," or "discriminatorily" – all quintessential jury questions. For three days the jury deliberated about the evidence, asking the court clarifying questions and reviewing key exhibits.[6] After one juror was dismissed

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[6] Significantly, the very first exhibit that the jurors requested to review after they had begun their deliberations was the transcript of the Kagel arbitration.

during deliberations due to illness, the 11 remaining jurors completed a detailed verdict form recording their verdicts as to *each* of the 109 original plaintiffs. The jury unanimously found that respondents had breached their duty of fair representation in three distinct ways: by bad faith, arbitrary and discriminatory conduct. Pet. App. A34-40. However, after carefully considering the evidence, the jury found that only 82 of the 109 plaintiffs had been legally injured by ALPA's breach (*id.* at A8, A34-40), which the court had defined as whether ALPA's actions caused a pilot to be denied training or otherwise to be prevented from applying for transfer to Delta.

The district court, however, would not abide the jury's verdict that the union had betrayed the pilots. Nearly one year after the jury had rendered its verdict, the district court rejected the jury's verdict and findings and granted ALPA judgment, pursuant to Rule 50 of the Federal Rules of Civil Procedure, in a 6-page decision devoid of citation to any case law, the 3077-page transcript or a single exhibit. *Id.* at A8, A23-27.[7]

III. The pilots timely appealed from the judgment of the district court, and on August 12, 1998, a three-judge panel of the United States Court of Appeals for the Second Circuit issued a decision affirming the judgment. The court of appeals' decision is notable in several respects. First, the court stated that the standard of

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[7] The district court also conditionally granted ALPA a new trial on the ground that the jury, which had found *against* 21 plaintiffs, must have been "swayed by prejudice." Pet. App. A9, A26.

review required it to affirm the district court's judgment if "there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against [it]." *Id.* at A10.

Second, although the court of appeals properly recognized that a union's interpretation of its collective bargaining agreement is not entitled to deference if it is based upon improper motives (*id.* at A13), the court utterly failed to address the pilots' principal argument – that the jury had reasonably concluded that ALPA's proffered interpretation of the PWA was a litigation contrivance based upon improper motives. Instead, the court simply concluded that the union's interpretation of the PWA, while "arguably wrong," was not "so unreasonable as to constitute a breach of the duty of fair representation." *Id.* Drawing upon this conclusion, the court then held that, *as a matter of law*, certain specific actions of the MEC – such as its failure to process the pilots' grievances and its secret agreement with Pan Am to "modify" the PWA – did not constitute arbitrary, bad faith or discriminatory conduct.

Third, the court of appeals agreed that the evidence supported a finding that respondents had "delayed confessing [their] agreement with Pan Am for a period of time (or masked that agreement by claiming that the arbitrator decided the issue)." *Id.* at A17. Nevertheless, the court then erroneously concluded that their delay did not prejudice petitioners. *Id.*

REASONS FOR GRANTING THE WRIT

This petition principally asks the Court to establish a constitutionally permissible, uniform legal standard for reviewing motions for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. There is significant and direct conflict among the federal circuits as to the appropriate legal standard for considering Rule 50 motions, as many commentators have long recognized. *Compare Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705, (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997) (court may consider *all* of the evidence); *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1008 (4th Cir. 1985) (court may consider "all of the evidence favorable to the position of the party opposing the motion as well as any unfavorable evidence that the jury is required to believe"); *Day v. Amax, Inc.*, 701 F.2d 1258, 1262-63 (8th Cir. 1982) (court may only consider evidence favorable to party opposing motion).

Although the Court, more than half a century ago, rejected a facial challenge to Rule 50 as contrary to the Seventh Amendment, *see Galloway v. U.S.*, 319 U.S. 372 (1943), the absence of a uniform legal standard in the circuit courts puts at risk the constitutional right of parties to have disputed issues of fact resolved by juries. As explained below, many courts, including the Second Circuit in this case, apply a legal standard for deciding Rule 50 motions that allows a court to consider *all* of the evidence presented at trial, including unfavorable and disputed evidence presented by the moving party, in deciding whether, as the Court of appeals stated here, the movant's evidence "overwhelmed" the evidence presented by the nonmovant. This legal standard inevitably

allows courts to weigh the evidence and to make credibility determinations. Yet each are functions that the Seventh Amendment allocates solely to the jury. Moreover, using such a standard of review improperly conflates the standard for determining a motion for judgment as a matter of law with the standard that governs motions for new trial, under Rule 59, on the ground that the verdict is against the weight of the evidence.

As Justice White observed 16 years ago, "the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v. . . . " *Schwimmer v. Sony Corp. of America*, 459 U.S. 1007, 1009 (1982) (dissenting from denial of petitions for writs of certiorari). Consistent with Justice White's observation, because the court of appeals applied the wrong standard, it reached the wrong result in granting respondents judgment as a matter of law.

In addition, petitioners ask the Court to review the court of appeals' conclusion that they had failed to establish that the union's conduct caused them injury. As explained in greater detail below, the court could only reach this conclusion by treating all 82 petitioners as part of a homogenous group, with indistinct claims. Pursuant to Rule 20(a) of the Federal Rules of Civil Procedure, however, the joinder of petitioners in this action was merely procedural. Thus, the court was required to consider each petitioner's claim on its own merits, which it demonstrably failed to do.

I. THE SECOND CIRCUIT'S LEGAL STANDARD FOR REVIEWING A DISTRICT COURT'S GRANT OF JUDGMENT AS A MATTER OF LAW VIOLATES RULE 50 AND THE SEVENTH AMENDMENT.

A. The Court of Appeals Improperly Weighed the Evidence and Made Credibility Determinations.

The Second Circuit properly reviewed the district court's grant of judgment as a matter of law *de novo*. Pet. App. A9. However, the legal standard that the court of appeals used in considering the motion for judgment as a matter of law was incorrect and unconstitutional. According to the Second Circuit, the proper standard for reviewing a Rule 50 judgment required it to affirm the district court if: "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise or conjecture, or (2) *there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against [it].*" *Id.* at A10. (emphasis added). There can be no doubt that the court of appeals affirmed the judgment of the district court not because of an absence of evidence supporting the pilots' claim, but rather because the court believed that the union's evidence "overwhelmed" the pilots' evidence.

This is apparent from the court's conclusion regarding the union's defense of "constraints" and its interpretation of the PWA. For example, ALPA made the strategic decision to support its "constraints" defense with the testimony of one witness – Vito Cutrone. ALPA's

story that its actions during the fall and summer of 1991 were dictated by alleged "constraints" was based *entirely* on what Cutrone allegedly told ALPA and his own superiors at Pan Am during that time period. The jurors, however, obviously did not believe Cutrone, and they were entitled to reject his testimony. The evidence presented at trial, however, established that Cutrone was not a disinterested witness and that his trial version of events was inconsistent with his own testimony, documentary evidence and the testimony of other witnesses. And without Cutrone's testimony, ALPA had *no* evidence (other than inadmissible hearsay) to support its story that various "constraints" precluded a training selection methodology that followed seniority. The jurors were also entitled to reject respondents' interpretation of the PWA as the product of self-interest and as contrary to the union's past interpretation of the PWA and the positions they had taken before arbitrator Kagel.

Nevertheless, throughout its opinion the court of appeals expressly relied upon alleged "facts" that were derived entirely from Cutrone's testimony. Moreover, it did so without having observed Cutrone testify, as the jury did. The court also deferred to the union's interpretation of the PWA without ever addressing the pilots' claim that the interpretation was a litigation contrivance, particularly in view of the union's self-interest and the position that it had taken on the PWA during the Kagel arbitration. *See supra* at 10.

By applying a standard of review that permitted it to decide whether the union's evidence "overwhelmed" the pilots' evidence, the court of appeals weighed the conflicting evidence on these and other issues and made its

own credibility determinations in a case where the individual respondents' state of mind – the motive or purpose for their actions – was central to the pilots' claim. As this Court has repeatedly held, however, the Seventh Amendment allocates those tasks to the jury, not the judge. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990) ("[In] considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). The standard of review that the court of appeals applied renders a motion for judgment as a matter of law under Rule 50 virtually indistinguishable from a motion for a new trial under Rule 59 on the ground that the verdict is against the weight of the evidence. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (trial judge in federal system has "discretion to grant a new trial if the verdict appears [to the judge] to be against the weight of the evidence"). Indeed, commentators have noted the tendency of courts to confuse the standards applicable to these two motions, the granting of which obviously produces very different outcomes for a plaintiff. *See, e.g.*, 11 Wright & Miller, *Federal Practice and Procedure*: Civil 2d § 2806 at 63-64 (1995) [hereinafter *Federal Practice*]. That is precisely what occurred here with the Second Circuits' adoption of an incorrect standard for reviewing the judgment as a matter of law.

The proper standard of review under Rule 50 would have restricted the court of appeals to considering only the evidence that the pilots presented in support of their claim and any unfavorable evidence presented by the union that the jury was required, as a matter of law, to believe.[8] The Court's decision in *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), is consistent with this standard. In *Wilkerson*, the Court stated:

> It is the established rule that in passing upon where there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.

Id. at 57.[9] *See also Webb v. Illinois*, 352 U.S. 512, 513-14 (1957) (quoting *Wilkerson* with approval); 9A *Federal Practice* § 2529 at 300-01 (describing *Wilkerson* as consistent with standard of review that permits consideration of favorable evidence and evidence that jury is required to believe). This is also the position of the Fourth Circuit, and commentators. *See St. Paul Fire & Marine Ins. Co.*, 779 F.2d at 1008 (court may consider "all of the evidence favorable to the position of the party opposing the

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[8] Evidence that a jury is required to believe includes, for example, evidence of undisputable natural laws of physics or undisputed physical facts. *See* 9A *Federal Practice* § 2527 at 285. Such evidence might also include uncontradicted and unimpeached testimony from disinterested witnesses. *See id.* at 286. The union presented no such evidence in this case.

[9] In *Wilkerson*, there was no unfavorable evidence of a type that the jury was required to believe. *See* 9A *Federal Practice* § 2529 at 301.

motion as well as any unfavorable evidence that the jury is required to believe"); Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 948-53 (1971); 9A *Federal Practice* § 2529 at 299-300 ("The correct rule seems to be that the district court may consider all of the evidence favorable to the position of the party opposing the motion for judgment as a matter of law as well as any unfavorable evidence that the jury is required to believe.").

Had the court of appeals applied the correct legal standard, the court could not have affirmed the district court's grant of judgment as a matter of law. The pilots submitted evidence to show that the union's constraints defense was contrived and contrary to Cutrone's own analysis that Pan Am could train 120 pilots on long-course training by November 1. The jury also heard from the former director of Pan Am's training facility, who was responsible for finding simulator training time for Pan Am pilots and who testified as an expert witness. He expressly rejected Cutrone's testimony about the lack of simulator capacity and stated that Pan Am easily could have obtained sufficient simulator capacity to train enough pilots, in seniority order, to meet the Delta quota. In short, had the court of appeals applied the correct legal standard, petitioners submit that it would have been compelled to conclude that the evidence supported the jury's findings and verdict that: 1) the PWA required the selection of pilots for training for possible transfer to Delta to be based on seniority; and 2) that Pan Am had sufficient time, money and simulator capacity to select petitioners for training according to seniority.

The pilots' challenge to the legal standard that the court of appeals applied in this case is, therefore, not merely a debate about semantics. As Justice White observed, the choice of the standard of review that an appellate court applies in reviewing a judgment as a matter of law can be dispositive, and it certainly was in this case. The Court should grant this petition to establish the proper legal standard and thereby correct an error that deprived the pilots of their constitutional right to have their claims decided by a jury.

B. A Longstanding Conflict Exists Among the Circuit Courts Regarding the Proper Legal Standard for Reviewing the Grant of Judgment as a Matter of Law.

The legal issue that the pilots seek to have the Court address is not limited to the Second Circuit's decision in this case. As one commentator has stated, "There has been some controversy concerning what portion of the evidence the trial court is to consider in deciding on a motion under Rule 50 whether there is a jury issue." 9A *Federal Practice* § 2529 at 297. The Eighth Circuit's longstanding position is that consideration should be limited to evidence favorable to the verdict, and nothing more. *See, e.g., Day v. Amax, Inc.*, 701 F.2d at 1262-63; *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 566-67 (8th Cir. 1967). By contrast, the Fifth and Ninth Circuits, like the Second Circuit, permit consideration of all of the evidence. *See, e.g., Mattern*, 104 F.3d at 705. The Fourth Circuit, as noted above, follows what petitioners believe is the correct standard – it restricts review to all of the evidence favorable to the position of the party opposing a Rule 50

motion as well as any unfavorable evidence that the jury is required to believe. *See St. Paul Fire & Marine Ins. Co.*, 779 F.2d at 1008. This lack of uniformity has not gone unnoticed by commentators. *See, e.g.*, 9A *Federal Practice* § 2529 at 297-301 (discussing split among the circuits).

A correct and uniform legal standard for motions for judgment as a matter of law under Rule 50 is essential to protect the constitutional rights of litigants to have disputed issues of fact resolved by a jury. Accordingly, the Court should grant this petition to resolve this longstanding controversy among the circuit courts of appeal with respect to the legal standard for reviewing judgments as a matter of law under Rule 50.

II. THE COURT OF APPEALS VIOLATED THE SEVENTH AMENDMENT AND RULES 50 AND 20(a) IN CONCLUDING THAT PETITIONERS HAD FAILED TO ESTABLISH CAUSATION.

In addition to asking the Court to address and correct the Second Circuit's application of the wrong legal standard for reviewing a judgment as a matter of law under Rule 50, petitioners also ask the Court to review the court of appeals' related and erroneous conclusion that "[e]ven if the evidence supported the jury's conclusion that ALPA breached its duty of fair representation, the pilots failed to adduce any evidence that the breach *caused* their injury." Pet. App. A20 (emphasis added). This conclusion was fatally flawed for two fundamental reasons.

First, the court of appeals' causation decision was the product of the application of the same constitutionally infirm legal standard that infected its review of the pilots'

claim that ALPA had breached its duty of fair representation. In other words, the court of appeals improperly weighed the unfavorable and disputed causation evidence that the union had submitted, rather than considering whether the pilots' evidence was sufficient to establish causation. *See supra* at 19-24.

For example, the court of appeals' conclusion that ALPA's failure to prosecute the pilots' grievances was of no consequence flowed directly from its earlier conclusion that those grievances were meritless. Pet. App. A16. To reach that conclusion, however, the court of appeals first had to decide that the seniority provisions of the PWA did not require Pan Am to offer training on the A-310 and B-727 to pilots in seniority order as part of the Delta transaction. That decision is unsupportable for at least three reasons. One, the plain language of the seniority provision of the PWA required seniority to be followed in all situations "except where specifically excepted in the [PWA]." Thus, the provision established seniority as a default standard. Pet. App. A12. Two, the evidence of the Kagel arbitration established that the respondents themselves understood that the PWA applied in the context of the Delta transaction and that their contrary position at trial was a litigation contrivance. Three, Kagel, a neutral arbitrator, actually decided that the PWA required training in seniority order.

In the face of this evidence, the court of appeals erred in deferring to an interpretation of the PWA that the union proffered only while in litigation and in concluding that pursuit of the grievances would have been fruitless. Because the evidence established that the pilots had a legal right under the PWA to bid for training based on

seniority, they were entitled to damages they suffered as a result of Pan Am's breach of the PWA, a breach in which ALPA actively participated. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 187 (1966).

Second, pursuant to Rule 20(a) of the Federal Rules of Civil Procedure, the joinder of the pilots in this action was merely procedural and did not alter their substantive rights. Each pilots' right of action remained distinct, as if separately brought. *See* Fed. R. Civ. P. 20(a) ("Judgment may be given for one or more of the plaintiffs according to their respective rights to relief. . . . "); 7 *Federal Practice* § 1652 at 375 (stating proposition). Thus, each pilot was entitled to have his own claim, including the causation element of the claim, evaluated on its own merits.

The court of appeals, however, did not adhere to Rule 20(a). Instead, as its opinion reveals, it treated the pilots as a homogenous group with indistinct claims, as if they were part of a class action. Had the court of appeals evaluated each pilots' claim on its own merits, it would have been compelled to conclude that sufficient time, money and simulator capacity existed to offer training to at least *some* of the petitioners based upon seniority. As but one of many examples, petitioner Stewart Beckett, a Boeing 747 captain at the time of Pan Am's demise, was number 84 on the Pan Am seniority list of over 2000 pilots. I JA 423. He surely would have been trained on the A-310, and thus been eligible for transfer to Delta, had respondents not abandoned the principle of seniority in the selection of pilots for training. Yet the court of appeals' opinion never even discusses the individual verdict of any petitioner, but merely assumes that the union's "constraints" defense would have prevented

every petitioner from training for, and transferring to, Delta.

In sum, in rejecting the jury's finding that the union's bad faith, discriminatory and arbitrary conduct had caused injury to 82 of 109 pilots, the court of appeals failed to abide by the proper standard of review for a Rule 50 motion and failed to consider each individual pilot's evidence as required by Rule 20(a). This Court should grant certiorari to correct these important errors and to reaffirm the primacy of the jury's role in deciding issues of fact.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 11, 1999

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Plaintiffs-Appellants,

v.

AIRLINE PILOTS ASSOCIATION-INTERNATIONAL; J. Randolph Babbitt, III; Richard L. Burke; Sigfrid W. Hauck; Kenneth C. Lankford; John Mitvalsky; Robert E. Anderson; Robert F. Bible; G. Hart Kelley; and Gustave M. Littlefield, Defendants-Appellees.

No. 97-7666.

United States Court of Appeals,

Second Circuit.

Argued April 3, 1998.

Decided Aug. 12, 1998.

Mark R. Kravitz, Wiggin & Dana, New Haven, Connecticut (Daniel J. Klau, of counsel), for Plaintiffs-Appellants.

Michael E. Abram, Cohen, Weiss and Simon, New York City (Peter Herman, Thomas N. Ciantra, Tamir W. Rosenblum, of counsel), for Defendants-Appellees.

Before: McLAUGHLIN, PARKER, Circuit Judges, and HURLEY, District Judge.*

BACKGROUND

McLAUGHLIN, Circuit Judge.

Pan American Airlines ("Pan Am") went bankrupt. Plaintiffs-Appellants are 88 of the approximately 1600 pilots who used to fly for Pan Am. These pilots were represented by the Airline Pilots Association-International ("ALPA"), the certified collective bargaining representative for pilots employed by all the major airlines operating in the United States. Under ALPA's union structure, the pilots for each airline elect a Master Executive Committee ("MEC"), of pilots. Subject to ALPA's

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* The Honorable Denis R. Hurley of the United States District Court for the Eastern District of New York, sitting by designation.

oversight, the MEC makes the collective bargaining decisions for the union in negotiations between the airline and its pilots.

The MEC for Pan Am pilots had three officers and four elected representatives. At all times relevant to this appeal, Richard Burke, Robert Anderson, and Gordon Littlefield were, respectively, the Chairman, Vice-Chairman and Secretary-Treasurer of the MEC. The four elected representatives were Sigfried Hauck, Kenneth Lankford, Robert Bible, and G. Hart Kelley.

Pan Am occupies a venerable position in the history of American aviation. In the late 1960's, however, Pan Am ran into financial turbulence. After struggling to survive for two decades, Pan Am began to sell assets. In 1985, it sold its Pacific routes to United Airlines ("United"). In late 1990, Pan Am sold additional aircraft and routes to United. However, these asset sales merely delayed the inevitable. In January 1991, Pan Am filed for reorganization under Chapter 11 of the bankruptcy laws.

While in reorganization, Pan Am continued to search for potential buyers of its remaining assets. In early July 1991, the MEC informed Pan Am pilots that Delta Airlines ("Delta") had agreed to buy Pan Am's North Atlantic routes and "shuttle" operation. Under the proposed Asset Purchase Agreement ("APA"), Pan Am would sell its entire fleet of Airbus 310 ("A-310") aircraft and up to 19 of its Boeing 727 ("B-727") aircraft to Delta. In return, Delta would sponsor and fund Pan Am's reorganization as a going airline, purchase a 45% equity stake in Pan Am, and establish a marketing alliance with Pan Am.

Pan Am also agreed to supply Delta with nearly 800 pilots who were "current and qualified" on those two planes. A "current and qualified" pilot is one who is trained to fly a particular airplane and has made three takeoffs and landings on that plane within the last ninety days. Delta needed approximately 494 qualified pilots for the A-310 aircraft and 280 for the B-727. Since Pan Am did not have enough "current and qualified" pilots to satisfy Delta's needs, it needed to train some of its pilots for transfer to Delta. Pan Am and Delta agreed that the transfer of pilots and assets would occur no later than November 1, 1991.

On July 20, 1991, Pan Am's crew chief, Vito Cutrune, presented a proposal to Pan Am, Delta, and the MEC that would allow Pan Am to offer pilot training on a strict seniority basis. He concluded that Pan Am had enough money and flight simulator capacity to complete 120 "long course" training programs for the A-310 and 22 long course programs for the B-727. Long course programs were designed for pilots who had never before flown the A-310 or B-727. Accordingly, since every Pan Am pilot would be eligible for training under Cutrune's proposal, the training would be offered on a strict seniority basis.

The long course training proposal was consistent with the seniority-based methodology by which most Pan Am pilot assignments were determined. The Pilot Working Agreement ("PWA"), the collective bargaining agreement between Pan Am and its pilots, provided that whenever Pan Am projected a major change or "shift" in its flight operations, it announced the change to the pilots and issued a "proffer." *See* PWA §§ 3, 5. The new flight

positions were posted in the proffer and pilots had an opportunity to "bid" for these positions. Pan Am then issued "awards" to the pilots, based on their seniority. *See id.*

On July 24, 1991, as Pan Am and Delta were finalizing the APA, Pan Am rejected the strict seniority plan. Pan Am explained that it could not accept the long course proposal because: (1) there was insufficient time to train the requisite number of pilots before Delta's deadline; and (2) even if the training could be accomplished in time, training by seniority would decimate the ranks of senior Pan Am captains needed to continue Pan Am's operations after the sale.

The MEC sought to accommodate Pan Am by presenting an alternate plan, entitled the "System Seniority Transfer Plan." Under this plan, pilots could gain eligibility for transfer by training after the November 1, 1991 deadline set by Pan Am and Delta. Upon completion of their training, these pilots would transfer to Delta, thereby bumping to the bottom of Delta's seniority list junior pilots who had transferred on November 1, 1991. On July 31, 1991, Delta rejected the System Seniority Transfer Plan, explaining that training after November 1, 1991 conflicted with its plan for a "turn-key" operation and would result in too many senior pilots being hired, adversely affecting the normal Delta cross-section and profile of airmen.

On August 2, 1991, the MEC met to discuss how pilots would be trained for transfer to Delta. After debating various training and transfer plans, it presented a new plan calling for "short course" training on the A-310.

Short course training is a refresher course for pilots who had once flown, but are no longer qualified to fly, a particular airplane. Under the short course plan, only pilots who had previously flown the A-310 were eligible for training. While few Pan Am pilots had experience flying the A-310, four members of the MEC had flown this plane.

The short course plan was supported by Cutrune, Pan Am's crew chief, who told Pan Am executives that his original training proposal, long course training, was simply not feasible. He said that under his "revised analysis," the necessary simulator time for long course training on the A-310 could not be arranged before the date of sale. Cutrune explained, however, that the short course plan could be accomplished. On August 8, 1991, Pan Am and Delta decided to adopt the short course plan for the A-310.

Rather than informing the pilots that a training plan had now been adopted, the MEC told the pilots that Delta was still open to alternative plans. They assured the pilots that Delta would listen to any plan designed to preserve the integrity of the seniority system. The MEC also told the pilots that, rather than deciding which of the competing plans it would endorse, ALPA and the MEC would let an arbitrator decide which plan best served the union's interests. However, since Pan Am and ALPA had agreed in principle on a plan governing retraining on the A-310, the only issue presented to the arbitrator was the B-727 training. The arbitrator recommended a training plan for the B-727 based on strict seniority.

Following the arbitrator's decision, ALPA, Pan Am, and Delta entered into a formal agreement defining the training for Pan Am pilots. ALPA agreed that the short course training would be used for the A-310, but a strict seniority system would be used to select pilots for B-727 training. The Bankruptcy Court approved this agreement. When Pan Am sold the planes and routes in November 1991, six of the seven MEC members were on the list of pilots to be transferred to Delta. Shortly thereafter, Pan Am went out of business.

Accusing the MEC pilot members of feathering their own nests, two groups of pilots sued ALPA and the individual members of the MEC. The first group, the "Spellacy" pilots, commenced an action in the United States District Court for the District of Connecticut (Dorsey, *J.*), alleging that ALPA and the MEC breached their duties of fair representation by adopting the short course training plan. The Spellacy pilots asserted that ALPA and the MEC violated their duties because: (1) the PWA required that training opportunities be awarded on a strict seniority basis and ALPA failed to protect the pilots' contractual rights; and (2) ALPA and the MEC advocated the short course plan so that they could secure pilot positions for themselves.

The second group, the "Duke" pilots, filed an action in the United States District Court for the Eastern District of New York (Weinstein, *J.*). These pilots each held a "proffer," – *i.e.*, an offer from Pan Am to be transferred to Delta. These proffers had been given before Pan Am realized that it lacked a sufficient number of qualified pilots to send to Delta. The Duke pilots alleged that

ALPA should first have ensured that Pan Am honored the existing proffers before implementing a training program.

The actions were consolidated for trial in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1404(a) and Fed. R. Civ. P. 42(a). Judge Weinstein bifurcated the trial, directing that the issue of liability be tried first. In June 1996, following a three-week trial and three days of deliberations, the jury returned a verdict for both sets of plaintiffs. The jury found that ALPA had breached its duty of fair representation to both the Duke and Spellacy pilots by engaging in bad faith, arbitrary, and discriminatory conduct. The jury found that 82 Spellacy plaintiffs and 12 Duke plaintiffs had been injured by ALPA and MEC's conduct. ALPA made a timely motion to set aside the verdict and for judgment as a matter of law.

While this post-trial motion was pending, the Duke pilots settled with ALPA. Nearly one year after the jury verdict was rendered, Judge Weinstein set aside the verdict for the Spellacy pilots and granted ALPA's motion for judgment as a matter of law. By Memorandum Order and Judgment dated April 14, 1997, amended April 21, 1997, Judge Weinstein held that: (1) the PWA did not require Pan Am to train pilots on a strict seniority basis; (2) the A-310 short course training plan constituted a reasonable balancing between seniority and cost; and (3) there was insufficient proof that the MEC placed their interests above those of the pilots.

Alternatively, Judge Weinstein held that a new trial on the issue of ALPA's liability was warranted. If the grant of judgment as a matter of law was eventually

reversed, Judge Weinstein believed that the liability phase should be retried because the evidence did not support a verdict for the Spellacy pilots and the jury "may have been swayed by prejudice against the [MEC]."

The Spellacy pilots now appeal, challenging both prongs of Judge Weinstein's decision. In response, ALPA argues that even if Judge Weinstein's decision was improper, a new trial is required due to errors in Judge Weinstein's jury instructions.

DISCUSSION

Judgment as a Matter of Law

The pilots argue that Judge Weinstein erred when he granted ALPA's motion for judgment as a matter of law. They contend that, viewing the evidence in the light most favorable to their claims, either: (1) ALPA breached its duty of fair representation by failing to fight for the pilots' rights under the PWA; or (2) ALPA and the MEC engaged in various additional acts that constituted arbitrary, discriminatory, or bad faith conduct.

A. *Standard of Review*

We review *de novo* the district court's order granting judgment as a matter of law. *See Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir.1997). "While it is hornbook law that we may not substitute our view of the evidence for the jury's when that evidence allows multiple legitimate inferences," *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 108 (2d Cir.1997) (citations omitted), we will affirm a grant of judgment as a matter of law

when "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise or conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against [it]." *Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1154 (2d Cir.1994) (quotation omitted); *see Binder v. Long Island Lighting Co.*, 57 F.3d 193, 199 (2d Cir.1995).

B. *Duty of Fair Representation*

A union, of course, has a duty to represent fairly all employees subject to the collective bargaining agreement. *See, e.g., Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). This duty extends to both the negotiation of a collective bargaining agreement, *see Ford Motor Co. v. Huffman*, 345 U.S. 330, 336, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), and its enforcement and administration. *See Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

A union breaches its duty of fair representation if its actions "can fairly be characterized as so far outside a 'wide range of reasonableness' . . . that [they are] wholly 'arbitrary, discriminatory, or in bad faith.' " *O'Neill*, 499 U.S. at 67, 111 S.Ct. 1127 (quotation omitted). Judicial review of union action, however, " 'must be highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities.' " *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1106 (2d Cir.1991) (quoting *O'Neill*, 499 U.S. at 67, 111 S.Ct. 1127).

A union acts in bad faith when it acts with an improper intent, purpose, or motive. *See Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 531 (10th Cir.1992). Bad faith encompasses fraud, dishonesty, and other intentionally misleading conduct. *See, e.g., Baxter v. United Paperworkers Int'l Union, Local 7370,* 140 F.3d 745, 747 (8th Cir.1998); *Mock,* 971 F.2d at 531.

Establishing that the union's actions were sufficiently "arbitrary, discriminatory or in bad faith," is only the first step toward proving a fair representation claim. Plaintiffs must then demonstrate a causal connection between the union's wrongful conduct and their injuries. *See, e.g., Ackley v. Western Conference of Teamsters,* 958 F.2d 1463, 1472 (9th Cir.1992); *Williams v. Romano Bros. Beverage Co.*, 939 F.2d 505, 508 (7th Cir.1991).

1. *Bad Faith Conduct*

The pilots adduce a welter of evidence presented during the three-week trial to support the jury's finding that ALPA acted in bad faith. Essentially, they contend that the jury could have found that ALPA acted in bad faith when it: (1) abandoned the principle of seniority mandated by Section 3-A of the PWA; (2) failed to follow its own constitution and by-laws by adopting Pan Am's training plan without a written decision; (3) entered into "secret" agreements designed to protect the interests of the MEC members at the expense of the Spellacy pilots; (4) made material misrepresentations designed to prevent the disclosure of the secret agreements; and (5) declined to represent or assist the pilots in filing and prosecuting their grievances. We are not persuaded.

Section 3-A of the PWA provides that:

> Seniority shall govern all pilots in case of promotion or demotion, their retention in case of reduction of force, their assignments or reassignments due to expansion or reduction in force, their choice of vacancies, placement or replacements, provided that the pilot is sufficiently qualified for the conduct of the operation to which he is assigned; and, in the event the pilot is considered by [Pan Am] not to be sufficiently qualified, [Pan Am] shall furnish the pilot written reasons therefor. Section 3-A shall apply except where specifically excepted in the [PWA].

The pilots construe this provision to apply because either: (1) Section 3-A is the "default" provision and nothing in the PWA preempts application of its strict seniority rule; or (2) the transfer of pilots and equipment to Delta constituted a "reduction in force" within the meaning of Section 3-A. Thus, their argument runs, because Pan Am was contractually obligated to offer pilot training on a strict seniority basis, ALPA breached its duty of fair representation by concluding that the PWA did not govern training for transfer to Delta. ALPA responds that Section 3-A refers only to *Pan Am's* operations, and its interpretation that the PWA does not apply to training pilots for transfer to Delta as part of a partial asset sale is, therefore, not unreasonable. Essentially ALPA's argument is that its interpretation does not have to be right. It need only be plausible.

"To uphold the union's action in interpreting the contract as it did it is not necessary that we find on the merits that such an interpretation was correct." *Tedford v.*

Peabody Coal Co., 533 F.2d 952, 957 (5th Cir.1976) (citing *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967)). Rather, our inquiry is limited to whether the union took a position on the basis of an informed, reasoned judgment regarding the merits of the pilots' claim in light of the language contained in the collective bargaining agreement. *See id.* (union's contract interpretation must be reasonable and "(1) based upon relevant, permissible union factors which (exclude) the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of the consideration of those factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees"); *see also, e.g., Bache v. American Tel. & Tel.*, 840 F.2d 283, 290 (5th Cir.1988).

ALPA's position that Section 3-A does not apply in the context of a partial asset sale, while arguably wrong, is not so unreasonable as to constitute a breach of the duty of fair representation. Section 3-A does not make any reference to employee rights in the event of an asset sale; it merely requires that rights provided in the PWA be allocated by seniority unless preempted by another provision of the PWA.

Moreover, while the PWA contained a few provisions related to asset sales, none provided the rights claimed by the pilots. Section 35, entitled "Acquisitions and Sales," guaranteed the union's right to negotiate with Pan Am concerning the effects of an asset sale. Section 1.E provided special protection to junior pilots who were furloughed because of a sale of routes. Section 1.D required any successor carrier that might take control of Pan Am to operate under the PWA, absent an agreement to the

contrary among the union, Pan Am, and the successor carrier.

In light of the PWA provisions specifically defining the rights and responsibilities of Pan Am and ALPA during a partial asset sale, ALPA's decision to accept Pan Am's view that Section 3-A's generic seniority provision applied only to Pan Am's operations – and not Delta's – is not unreasonable. *See Flanigan v. (International Bhd. of Teamsters, Warehousemen & Helpers of Am.) Truck Drivers Local No. 671*, 942 F.2d 824, 827 (2d Cir.1991) ("[u]nion cannot be faulted for acceding to" employer's logical interpretation of seniority provision).

Pan Am's conduct during earlier asset sales also supports ALPA's thesis. *See Rupe v. Spector Freight Sys., Inc.*, 679 F.2d 685, 693-94 (7th Cir.1982) (union's interpretation of seniority provision reasonable when consistent with employer's previous practices). In 1985, for example, when Pan Am sold routes to United, Pan Am trained only those pilots with experience on the planes transferred to United, not its most senior pilots. In addition, in its 1988 term sheet for the collective bargaining agreement, Pan Am refused to provide pilots any "assurances" regarding their treatment in an asset sale; and it refused to accept any contractual responsibilities that could jeopardize its ability to complete a transaction.

Moreover, in late 1990, when Pan Am sold its London Heathrow routes to United, it did not transfer its pilots solely on the basis of seniority. United agreed to hire pilots in seniority by category (*i.e.*, captains hired to fill captain positions; first officers for first officer positions). As a result, senior captains who sought employment at

United, and who were qualified to fill first officer positions, were passed over in favor of junior first officers for the first officer positions. When ALPA subsequently sought Pan Am's agreement to protect senior pilots during asset sales, Pan Am again refused to limit its flexibility.

The pilots' alternative contention that Pan Am was required to train pilots for transfer to Delta in order of seniority because the transfer of assets and pilots constituted a "reduction in force" within the meaning of Section 3-A, is similarly unpersuasive. In the case of a reduction in force, Section 3-A entitled pilots to "retention" by Pan Am, not relocation, or training to promote relocation, to another airline.

The pilots' remaining bad faith arguments are without merit. They argue that ALPA and the MEC violated the union's constitution and by-laws by allowing Pan Am to amend the PWA without a written agreement. However, ALPA's position that the PWA did not apply to the adoption of a training program was a reasonable construction. Therefore, ALPA believed that Pan Am could proceed without reaching a written agreement with ALPA. Since "ALPA's interpretation of its governing documents is not unreasonable[,] by following its own interpretation ALPA did not breach its [duty of fair representation] in bad faith." *O'Neill v. Air Line Pilots Assoc., Int'l*, 939 F.2d 1199, 1207 (5th Cir.1991); *see Baker v. Newspaper & Graphic Communications Union, Local 6*, 628 F.2d 156, 166-67 (D.C.Cir.1980).

ALPA's decision not to file grievances on behalf of the effected pilots, or to assist pilots in prosecuting grievances, similarly does not rise to the level of bad faith. While "a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion," union members do not have an "absolute right to have [their] grievances taken to arbitration." *Vaca*, 386 U.S. at 191, 87 S.Ct. 903; *see Cruz*, 34 F.3d at 1153-54; *Pyzynski v. New York Cent. R.R. Co.*, 421 F.2d 854, 864 (2d Cir.1970).

In this case, ALPA decided that pursuing a grievance for the senior pilots would be fruitless. It reasoned that under the PWA, Pan Am was only required to consult with ALPA regarding the implementation of an appropriate training plan. Thus, prosecuting pilot grievances would not result in the adoption of a more favorable training program since the most senior pilots did not have a contractual right to receive training for transfer to Delta. This position is reasonable because: (1) ALPA had unsuccessfully attempted to negotiate contractual restrictions on Pan Am's freedom to arrange employment opportunities at other carriers; and (2) Pan Am, on two prior occasions, implemented asset sales involving employee transfers without permitting ALPA to do more than comment on the terms. Because ALPA's decision not to prosecute pilot grievances was based on a reasonable interpretation of the PWA, ALPA did not breach its duty of fair representation. *See Chaparro-Febus v. International Longshoremen Ass'n, Local 1575*, 983 F.2d 325, 330 (1st Cir.1992).

Finally, the pilots contend that ALPA and the MEC forged "secret" agreements with Pan Am and Delta that sacrificed the pilots' rights under the PWA. They assert

that the "secret" agreements and subsequent misrepresentations designed to cover their tracks constituted bad faith. The pilots rely on *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138 (2d Cir.1994), and *Aguinaga v. United Food & Commercial Workers*, 993 F.2d 1463 (10th Cir.1993). This reliance is misplaced.

In *Lewis* and *Aguinaga*, the unions entered into secret side-agreements with the employer that vitiated clear contractual rights of the employees. However, as discussed above, the Pan Am pilots had no such unambiguous contractual entitlement. Moreover, the employees in *Lewis* and *Aguinaga* were tricked into believing that their rights were preserved until it was too late to protest the employer's action. *See Lewis*, 25 F.3d at 1143; *Aguinaga*, 993 F.2d at 1471. In contrast, while the MEC delayed confessing its agreement with Pan Am for a period of time (or masked that agreement by claiming that the arbitrator decided the issue), the delay did not prejudice the pilots. The pilots here knew ALPA's position in time to challenge its decision, were aware that Pan Am adopted a training policy contrary to the one advocated by senior pilots, and hired attorneys to file grievances and organize resistance to Pan Am's proposed plan. Under these facts, we cannot say that ALPA or the MEC acted in bad faith by entering into a deal with Pan Am and Delta regarding the selection of pilots for training on the A-310 and B-727 aircraft. *See Ryan v. New York Newspaper Printing Pressmen's Union No. 2*, 590 F.2d 451, 457 (2d Cir.1979).

2. *Arbitrary Conduct*

Nor does the evidence support a conclusion that ALPA acted arbitrarily. "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' . . . as to be irrational." *O'Neill*, 499 U.S. at 67, 111 S.Ct. 1127 (quoting *Ford Motor Co.*, 345 U.S. at 338, 73 S.Ct. 681). A union's reasoned decision to support the interests of one group of employees over the competing interests of another group does not constitute arbitrary conduct. *See, e.g., Haerum v. Air Line Pilots Ass'n, Int'l*, 892 F.2d 216, 221 (2d Cir.1989); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir.1974).

The "factual and legal landscape" surrounding ALPA's decision required the union to balance not only the interests of the Spellacy plaintiffs, but also the pilots who remained at Pan Am and who were counting on the infusion of cash from the Delta deal to keep Pan Am afloat. It was of paramount importance to the remaining pilots that Pan Am meet Delta's deadline. By adopting a short course requalification program, rather than the long course program advocated by the senior pilots, Pan Am could train twice as many pilots in the same number of simulator hours. Such efficient use of its resources would ensure that Pan Am met Delta's hiring goal and save the financially-troubled airline money. Faced with these competing concerns, as well as Pan Am's stated intention to adopt the short course training plan guaranteed to meet Delta's deadline, ALPA's decision constituted a reasoned balancing of the interests of *all* pilots. Therefore, the

evidence did not support the jury's conclusion that ALPA acted arbitrarily. *See Ford Motor Co.*, 345 U.S. at 337, 73 S.Ct. 681; *Haerum*, 892 F.2d at 221.

3. *Discriminatory Conduct*

Finally, ALPA did not discriminate against the Spellacy pilots. The pilots contended at trial that the bitter animus between former National Airlines pilots ("Orange pilots"), who came to Pan Am in 1980 when Pan Am purchased National Airlines and who occupied a majority position on the MEC, and the original Pan Am pilots ("Blue pilots"), was a factor in ALPA's acquiescence in the short course training plan. The only evidence offered to support this assertion was a remark made by Burke, a former National Airlines pilot and member of the MEC, that the Delta deal offered an opportunity for former National Airlines pilots to "get out of" Pan Am. However, both the training and transfer plans were facially neutral. In addition, the pilots who did transfer constituted a proportionate mix of former National Airlines pilots and original Pan Am pilots. A reasonable jury could not conclude, based solely on the statement of a single MEC executive, that ALPA's actions arose from prejudice against the original Pan Am pilots. *See Griffin v. Air Line Pilots Ass'n, Int'l*, 32 F.3d 1079, 1084 (7th Cir.1994) ("statements by highly-placed union officials expressing distaste for pilots who did not join the union" did not support conclusion that union leaders targeted non-union pilots for dismissal, "especially when the shrapnel from the alleged attack also impacted a disproportionate number of union members").

Spellacy further claims that the MEC violated its duty of fair representation by placing four "Orange" friends of Burke in training on the B-727. We disagree. The four pilots held "proffers" for B-727 training. In late July 1991, they were displaced from B-727 training when Pan Am began training flight engineers, rather than pilots. After Pan Am denied grievances filed by these pilots, a majority of the MEC voted to ask Pan Am to allow the four pilots to be trained on the B-727.

Spellacy, however, failed to adduce any evidence that similarly situated "Blue" pilots were treated differently. Thus, we cannot conclude that the MEC's decision to request that Pan Am train these pilots was motivated by an animus against original Pan Am pilots.

4. *Causation*

Even if the evidence supported the jury's conclusion that ALPA breached its duty of fair representation, the pilots failed to adduce any evidence that the breach caused their injury.

First, the pilots claim that ALPA should have pursued grievances to compel Pan Am to offer training by seniority. However, as noted above, ALPA had no obligation to file meritless claims against Pan Am. *See Vaca v. Sipes*, 386 U.S. 171, 191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). At most, the pilots' grievances would have resulted in a confirmation of Pan Am's obligation to consult with ALPA over the transfer process. However, individual Pan Am pilots were authorized to pursue grievances without union involvement. Moreover, ALPA

did not obstruct the plaintiffs' ability to file grievances. Immediately after the Bankruptcy Court approved the sale agreement between Pan Am and Delta, ALPA representatives explained the agreement to the pilots at meetings in New York and Miami. ALPA advised pilots that they "may file a grievance . . . [without] union approval. . . . [I]f you feel you have been wronged by an incorrect application of our Working Agreement – challenge it." Plaintiffs-Appellants Spellacy, Rice, and Bennett did indeed file grievances without union support. Thus, any injury is independent of ALPA's failure to prosecute the pilots' claims.

The pilots' claims regarding the B-727 training similarly fail. The evidence does not support their contention that, absent the alleged breach, Pan Am would have agreed to provide the requisite amount of B-727 training courses. Pan Am never claimed that the facilities for such training were unavailable. Rather, Pan Am indicated that it had a sufficient number of "current and qualified" B-727 pilots to meet Delta's quota. Accordingly, Pan Am refused to accept *any* proposal requiring the expenditure of money to train pilots for the B-727.

Finally, with respect to the A-310 training, the pilots rely upon Cutrune's initial presentation on July 24, 1991, which raised the possibility of providing 120 A-310 and 22 B-727 "long courses" to senior pilots. The July presentation, however, did not create a contractual right to this training plan.

During the first week of August, Pan Am determined that it would not initiate any further long course training opportunities due to uncertainties surrounding Delta's

quota, the lack of simulator time, and genuine doubts about whether the long course training could be accomplished in time to meet Delta's firm deadline. Pan Am informed the MEC that, even if the MEC opposed the short course plan, Pan Am "would . . . move[ ] ahead" without the union's agreement. In light of Pan Am's unambiguous intention to proceed with or without the union's blessing, we cannot say that ALPA's decision not to advocate a seniority-based training system was the cause of the pilots' injuries.

Because we conclude that Judge Weinstein correctly granted ALPA's motion for judgment as a matter of law, we need not address either ALPA's contention that Judge Weinstein erred in instructing the jury or the pilots' argument that the grant of a new trial was improper.

CONCLUSION

We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, the judgment of the district court is AFFIRMED.

In re PAN AMERICAN WORLD AIRWAYS, INC./DELTA AIR LINES, INC. PILOT EMPLOYMENT LITIGATION.
Walter B. DUKE, Jr., et al., Plaintiffs,
v.
AIR LINE PILOTS ASSOCIATION, et al., Defendants.
Edward J. SPELLACY, Jr., et al., Plaintiffs,
v.
AIR LINE PILOTS ASSOCIATION, et al., Defendants.

Nos. MDL 963, CV 92-1049, CV 93-0853.

United States District Court,
E.D. New York.

April 14, 1997.

Scott M. Karsten, Sack, Spector & Barrett, West Hartford, CT, Sigismund Sapinski, Jr., Updike, Kelly & Spellacy, P.C., Hartford, CT, for Plaintiff, Spellacy.

Michael F. Baumeister, Douglas Latto, Baumeister & Samuels, New York City, for Plaintiff, Duke One.

Michael S. Haber, New York City, for Plaintiff, Duke Two.

Frederick D. Hafetz, Goldman & Hafetz, New York City, Michael E. Abrams, Peter Herman, Thomas Ciantra, Cohen, Weiss & Simon, New York City, for Defendants.

MEMORANDUM ORDER AND JUDGMENT

WEINSTEIN, Senior District Judge:

This judgment in favor of defendants ends the trial court's participation in a difficult Multidistrict litigation.

FACTS

During the terminal days of the then-bankrupt Pan American Airlines, it sold, under bankruptcy court aegis, the last of its major air routes and hundreds of its remaining planes, agreeing to furnish enough qualified Pan Am pilots to fly those planes as Delta employees. Since too few pilots were qualified, Pan Am agreed to train a sufficient number to meet Delta's requirements.

The local Airline Pilots Association Negotiating Committee had to make a series of decisions in cooperation with Pan Am on who would be trained. As a result of their determinations, those on the committee, together with hundreds of other pilots, were able to obtain employment with Delta as qualified pilots. Scores of other Pan Am pilots were denied that opportunity because they were not given the necessary training.

PROCEDURAL HISTORY

Pilots who were unable to obtain employment by Delta brought a number of suits. They were concentrated in the Eastern District of New York by the Multidistrict Panel.

Some pilots sued Delta Airlines. Their complaints were dismissed because Delta did not decide which Pan Am pilots were to be trained.

Three groups of pilots sued the Air Line Pilots Association ("ALPA") on the ground that they had been discriminated against by ALPA and that, under the Railway Labor Act, 45 U.S.C. §§ 151 et. seq., 181 et. seq., they had

a right to damages. The groups were denominated at the trial as Duke 1, Duke 2 and Spellacy plaintiffs.

The case was bifurcated. Tried at one time were all three groups' claims on the issue of liability. The jury found for almost all plaintiffs.

Following motions to set aside the verdicts, the court suggested that a mediator attempt to resolve differences among the parties. With the assistance of the mediator, the Honorable Milton Mollen, the Duke 1 and Duke 2 plaintiffs settled with ALPA. Their claims have been dismissed as moot.

DISMISSAL

The issue now is whether defendants' motion to dismiss or, in the alternative to provide a new trial, should be granted. It is with great renitence that a trial judge approaches a motion to ignore the decision of a well-instructed, well-advised, capable jury. The Spellacy plaintiffs' case should, however, be dismissed for at least three reasons:

First, insofar as the Spellacy plaintiffs are concerned, the pilots' collective bargaining agreement with Pan Am – which called for training on a seniority basis for operations of Pan Am – was not applicable to the subsequent Delta-Pan Am agreement entered into with the approval of the bankruptcy court to sell aircraft to Delta and to furnish trained pilots. The Delta-Pan Am agreement did not call for the kind of Pan Am operational decisions covered by the ALPA-Pan Am agreement. As a matter of law, the straight seniority system did not apply to the

Spellacy plaintiffs. Bankrupt, Pan Am was permitted to minimize training costs to itself by departing from strict seniority in a reasonable way in training pilots for transfer to Delta.

Second, the training program as devised and executed constituted a reasonable balancing of seniority and cost factors by those in charge of the process during a stressful period for everyone: the pilots, Pan Am, the bankruptcy authorities and creditors. A large number of pilots had to be retrained or requalified during a short period while Pan Am continued to operate.

Third, the jury's failure to draw a line somewhere reasonable in the Spellacy seniority list indicated that, despite its high quality, it was swayed by prejudice against the ALPA representatives because they ended up, as a result of their decisions, as Delta employees.

EQUITY

There is no basis in equity for an order either requiring some form of reinstatement of the Spellacy plaintiffs to positions held before the sale of Pan Am's aircraft to Delta or to those which they might obtain at Delta now. It would be impossible to restore the status quo ante. Any equitable causes, implied or explicit, in the complaint and at trial are decided against the Spellacy plaintiffs for the same reasons that the jury verdict cannot stand. See Federal Rules of Civil Procedure, Rule 52(a).

CONCLUSION

This decision covers all remaining aspects of the MDL case. Final judgment for defendant is now entered in these, the remaining open cases. No costs or disbursements.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

(Filed Oct. 13, 1998)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ninth day of October one thousand nine hundred and ninety-eight.

Edward J. Spellacy, Jr., and Stewart W. Beckett, Jr.,

Plaintiffs-Appellants,

V. Dkt No: 97-7666

Airline Pilots Association-International and J. Randolph Babbitt, III,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellants Edward J. Spellacy, Jr., and Stewart W. Beckett, Jr.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL,
Clerk

By: /s/ Beth J. Meador
Beth J. Meader,
Administrative Attorney

Federal Rules of Civil Procedure

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

* * *

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a matter of law.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to

stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) **Same: Conditional Rulings on Grant of Motion for Judgment as a Matter of Law.**

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) **Same: Denial of Motion for Judgment as a Matter of Law.** If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a

new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

EXHIBIT 39

Jury Verdict Form

1. Did ALPA violate its duty of fair representation to any or all of the plaintiffs?

   Yes ✓ No ___

If your answer to Question 1 was "No", do not proceed further.

2. Was the violation

   a. by being arbitrary Yes ✓ No ___

   b. by being discriminatory Yes ✓ No ___

   c. by bad faith Yes ✓ No ___

3. Did ALPA violate its duty of fair representation as to each of the plaintiffs listed below? Did the breach cause injury to each plaintiff for whom you found a breach to have occurred.

	Did ALPA breach its duty to this plaintiff?		Did ALPA cause an injury to? this plaintiff?	
Duke 1 Plaintiffs				
Aloysius J. Armstrong	Yes ✓	No_	Yes _	No ✓
Walter B. Duke, Jr.	Yes ✓	No_	Yes ✓	No_
Coy W. Gammage	Yes ✓	No_	Yes ✓	No_
Bernard L. Hladick	Yes ✓	No_	Yes ✓	No_
Claude B. Hudspeth	Yes ✓	No_	Yes ✓	No_

Peter R. Maupin	Yes ✓	No_	Yes ✓	No_
Bruce P. Murphy	Yes ✓	No_	Yes ✓	No_
David L. Nelson	Yes ✓	No_	Yes ✓	No_
Ray A. Perry	Yes ✓	No_	Yes ✓	No_
Donald S. Shotz	Yes ✓	No_	Yes ✓	No_
Ivan M. Sislik	Yes ✓	No_	Yes ✓	No_
Philip V. Vampatella	Yes ✓	No_	Yes ✓	No_
Richard L. Wentz	Yes ✓	No_	Yes ✓	No_
Duke 2 Plaintiffs				
Harold M. Gay, Jr.	Yes ✓	No_	Yes ✓	No_
H. Edw. Higginbotham	Yes ✓	No_	Yes _	No ✓
Robert L. Peterson	Yes ✓	No_	Yes ✓	No_
William W. Piavis	Yes ✓	No_	Yes ✓	No_
Mark L. Pyle	Yes ✓	No_	Yes ✓	No_
Herbert M. Valencia	Yes ✓	No_	Yes ✓	No_
Michael L. Wedge	Yes ✓	No_	Yes ✓	No_
Spellacy Plaintiffs				
Raymond Albers	Yes ✓	No_	Yes ✓	No_
Gordon Almquist	Yes ✓	No_	Yes ✓	No_
Gary Armstrong	Yes ✓	No_	Yes ✓	No_
Donald Arneson	Yes ✓	No_	Yes ✓	No_
Alvin Baer	Yes ✓	No_	Yes _	No ✓

James Bailey	Yes ✓	No_	Yes ✓	No_
Shafer Bean	Yes ✓	No_	Yes ✓	No_
Stewart Beckett	Yes ✓	No_	Yes ✓	No_
Sam Belcher	Yes ✓	No_	Yes _	No ✓
William Benefield	Yes ✓	No_	Yes ✓	No_
Tad Bingham	Yes ✓	No_	Yes ✓	No_
Vidmantas Bliumfeldas	Yes ✓	No_	Yes ✓	No_
Rudolph Brabenec	Yes ✓	No_	Yes ✓	No_
Robert Brickey	Yes ✓	No_	Yes ✓	No_
Vaughn Bridges	Yes ✓	No_	Yes _	No ✓
Michael Burke	Yes ✓	No_	Yes ✓	No_
Dallas Butler	Yes ✓	No_	Yes ✓	No_
James Byrne	Yes ✓	No_	Yes ✓	No_
James Canitz	Yes ✓	No_	Yes ✓	No_
Paul Carroll	Yes ✓	No_	Yes _	No ✓
Gerald Cassidy	Yes ✓	No_	Yes ✓	No_
Robert Cassube	Yes ✓	No_	Yes ✓	No_
Thomas Ceranic	Yes ✓	No_	Yes ✓	No_
David Criley	Yes ✓	No_	Yes ✓	No_
John Cunningham	Yes ✓	No_	Yes ✓	No_
Ash Cutchin	Yes ✓	No_	Yes _	No ✓
Donato D'Angelico	Yes ✓	No_	Yes ✓	No_
Donald Dale	Yes ✓	No_	Yes ✓	No_

Charles Davenport	Yes ✓	No_	Yes _	No ✓
Denis Dehne	Yes ✓	No_	Yes _	No ✓
Michael Dunne	Yes ✓	No_	Yes ✓	No_
Thomas Ebbert	Yes ✓	No_	Yes ✓	No_
Gerald Ellison	Yes ✓	No_	Yes ✓	No_
Keith Erlewine	Yes ✓	No_	Yes ✓	No_
Jerome Fox	Yes ✓	No_	Yes ✓	No_
Robert Frank	Yes ✓	No_	Yes ✓	No_
Alto Furlong	Yes ✓	No_	Yes ✓	No_
Howell Gannon	Yes ✓	No_	Yes ✓	No_
Benjamin Greer	Yes ✓	No_	Yes ✓	No_
Paul Hakim	Yes ✓	No_	Yes _	No ✓
Richard Hall	Yes ✓	No_	Yes _	No ✓
William Hankins	Yes ✓	No_	Yes _	No ✓
Eric Harper	Yes ✓	No_	Yes _	No ✓
Robert Harrell	Yes ✓	No_	Yes ✓	No_
Albert Harrison	Yes ✓	No_	Yes ✓	No_
William Hart	Yes ✓	No_	Yes ✓	No_
Reginald Havill	Yes ✓	No_	Yes ✓	No_
Robert Hays	Yes ✓	No_	Yes ✓	No_
Bernard Hladik	Yes ✓	No_	Yes ✓	No_
David Holland	Yes ✓	No_	Yes ✓	No_
Norman Hosking	Yes ✓	No_	Yes _	No ✓

Claude Hudspeth	Yes ✓	No_	Yes ✓	No_
Thomas Hurd	Yes ✓	No_	Yes ✓	No_
Richard Jackson	Yes ✓	No_	Yes _	No ✓
David Jones	Yes ✓	No_	Yes ✓	No_
Austin Joyner	Yes ✓	No_	Yes ✓	No_
Terrence Kane	Yes ✓	No_	Yes ✓	No_
Ronald Kelley	Yes ✓	No_	Yes _	No ✓
Kevin Kelly	Yes ✓	No_	Yes _	No ✓
David Klau	Yes ✓	No_	Yes ✓	No_
Donald Law	Yes ✓	No_	Yes ✓	No_
Kenneth Lemming	Yes ✓	No_	Yes ✓	No_
Byron Lewin	Yes ✓	No_	Yes ✓	No_
Manuel Lewis	Yes ✓	No_	Yes ✓	No_
Jack Linet	Yes ✓	No_	Yes _	No ✓
Michael Littlepage	Yes ✓	No_	Yes _	No ✓
Keith Mackey	Yes ✓	No_	Yes ✓	No_
John Marshall	Yes ✓	No_	Yes ✓	No_
John Mayer	Yes ✓	No_	Yes _	No ✓
Kenneth McAdams	Yes ✓	No_	Yes ✓	No_
Robert McGrory	Yes ✓	No_	Yes ✓	No_
Jan Menke	Yes ✓	No_	Yes ✓	No_
James Miller	Yes ✓	No_	Yes ✓	No_
Russell Miller	Yes ✓	No_	Yes _	No ✓

Bruce Murphy	Yes ✓	No_	Yes ✓	No_
John Neff	Yes ✓	No_	Yes ✓	No_
Ernest Neuwald	Yes ✓	No_	Yes ✓	No_
Thomas O'Dell	Yes ✓	No_	Yes ✓	No_
William Pitsker	Yes ✓	No_	Yes ✓	No_
Terry Pope	Yes ✓	No_	Yes ✓	No_
David Powers	Yes ✓	No_	Yes _	No ✓
Mark Pyle	Yes ✓	No_	Yes ✓	No_
Michael Ranslam	Yes ✓	No_	Yes ✓	No_
Frank Rice	Yes ✓	No_	Yes ✓	No_
Richard Robbins	Yes ✓	No_	Yes ✓	No_
Jack Rogers	Yes ✓	No_	Yes ✓	No_
Carl Schmeusser	Yes ✓	No_	Yes ✓	No_
George Schumacher	Yes ✓	No_	Yes ✓	No_
Harry Shepard	Yes ✓	No_	Yes ✓	No_
Donald Shotz	Yes ✓	No_	Yes ✓	No_
Bill Shuster	Yes ✓	No_	Yes ✓	No_
Conrad Smith	Yes ✓	No_	Yes ✓	No_
Dorsey Spaulding	Yes ✓	No_	Yes ✓	No_
Edward Spellacy	Yes ✓	No_	Yes ✓	No_
Michael Stafford	Yes ✓	No_	Yes ✓	No_
William Stevens	Yes ✓	No_	Yes ✓	No_
Timothy Sullivan	Yes ✓	No_	Yes ✓	No_

Anthony Thompson	Yes ✓	No_	Yes _	No ✓
Joel Thompson	Yes ✓	No_	Yes ✓	No_
John Tiger	Yes ✓	No_	Yes ✓	No_
Constantine Vlahakis	Yes ✓	No_	Yes ✓	No_
Robert Wardin	Yes ✓	No_	Yes ✓	No_
John Wentworth	Yes ✓	No_	Yes ✓	No_
Richard Wentz	Yes ✓	No_	Yes ✓	No_
Frank White	Yes ✓	No_	Yes ✓	No_
John White	Yes ✓	No_	Yes ✓	No_
John Zoller	Yes ✓	No_	Yes ✓	No_